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Nos. 07-984 and 07-990

In The
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,
Respondents.

ALASKA,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS SUPPORTING PETITIONERS

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SUMMARY OF ARGUMENT

As NAHB asserted in its initial *amicus curiae* brief,[1] whether a single discharge of pollutants must be authorized by a Clean Water Act (CWA) section 404 permit, or a section 402 permit, depends on the type of pollutant at issue. Section 404 applies to discharges of "dredged or fill material," while section 402 reaches "any" other pollutant. It would contravene the CWA's structure, and upset years of regulatory implementation and landowner expectations, to now suddenly require that a *single* discharge of pollutants must be covered by *both* a section 402 *and* 404 permit.

When dirt and sediment are involved, it is within the expertise of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to decide if the discharge is "dredged or fill material" or "any" other pollutant, and concomitantly which permit program applies. Here, the Corps decided that Coeur Alaska's discharge required a section 404 permit, and the court of appeals should have deferred to that reasonable determination. Moreover, in the regulatory review process leading up to the Corps's

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[1] Letters of consent are on file with the Clerk regarding NAHB's filing of its initial *amicus curiae* brief, and the Clerk has informed NAHB's counsel that those consents are applicable to this supplemental brief. Pursuant to Rule 37.6 of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. NAHB's interest in this case remains as stated in its initial *amicus curiae* brief.

issuance of the section 404 permit, EPA had ample opportunity to comment that the discharge should have been permitted through a section 402 permit that would have triggered its performance standard for froth-flotation mill operations. Indeed, EPA had the statutory authority under section 404(c) to veto the Corps's permit altogether. But EPA did not, so deference is due to the Corps's reasonable decision that a section 404 permit was necessary regarding the discharge at issue.

ARGUMENT

I. THE CORPS REASONABLY DETERMINED THAT COEUR ALASKA'S DISCHARGE REQUIRED A SECTION 404 PERMIT.

The Court's order of May 4, 2009, directed the parties and *amici* to file supplemental briefs addressing several additional questions. The first question is:

> If the discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act, would that future violation authorize a court to set aside the permits issued by the United States Army Corps of Engineers, and the Record of Decision issued by the United States Forest Service, as "not in accordance with law," 5 U.S.C. §706(2)(A)? See *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990).

The quick answer to that question is: No, a reviewing court should not be authorized to set aside the Corps 404 permit – especially when EPA does not intervene to require a section 402 permit to cover the discharge, and thereby trigger any applicable section 301 effluent limitation guideline or section 306 new source performance standard.

As NAHB concluded in its initial *amicus* brief, "this case boils down to agency deference." Brief of *Amicus Curiae* NAHB Supporting Pet'rs at 10, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, Nos. 07-984, 07-990 (S. Ct. filed Sept. 24, 2008) ("NAHB Initial AC Brief"). If Congress's intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In this regard, the CWA is clear that coverage under only one permit program – either section 402 or 404 – is needed to authorize a single pollutant discharge. *Infra* at 8-10; NAHB Initial AC Br. at 3-14. This is a *Chevron* "step 1" question. However, it is a "step 2" question as to which permit program should apply to cover a specific discharge. Deference is due to the expert decisions by the Corps (and EPA) as to whether the pollutant discharge at issue is best categorized as "fill material" or any "other" pollutant.

In the case at hand, the Corps permissibly construed section 404, the specific provision it was charged by Congress to administer, and applied its implementing regulations accordingly. The Corps did not act arbitrarily by failing to take sections 301 and 306 into account – which are administered by EPA

and within EPA's expertise to apply and interpret. Plainly, the *Corps* lacks expertise and has no power to enforce *EPA's* performance standard, promulgated under section 306 and incorporated into a section 402 permit, regulating process wastewater from froth-floatation operations.[2] See *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990) (explaining that an agency decision is not invalid for failing to consider laws in which it has no expertise).

In most situations, there will be little dispute as to whether a discharger must obtain either a section 402 or 404 permit. For example, if the discharge will create dry land in an area that was previously a CWA "navigable water," then the discharge will be deemed fill material and a section 404 permit must be obtained. 33 C.F.R. § 323.2(e)(1); *infra* at 10. However, as illustrated by this case, sometimes it is not simple to determine whether a single discharge is dredged or fill material (such that section 404 controls) or another pollutant (such that section 402 controls). In those instances, the expert agencies must make a determination and the court should defer to "the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

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[2] EPA's performance standard states: "Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores." 40 C.F.R. § 440.104(b)

In this case, the Corps received a section 404 permit application to discharge mine tailings. It accordingly had to decide whether the discharge fell within the definition of "dredged or fill material." 33 U.S.C. §1344(a). Its definition of "fill material," which closely tracks EPA's definition, provides:

> The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.

33 C.F.R. § 323.2(e)(1) (Corps regulation); 40 C.F.R. § 232.2 (EPA regulation). Furthermore, the Corps's definition of "discharge of fill material" also closely tracks EPA's definition, stating:

> The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: ... *placement* of overburden, slurry, or tailings or similar mining-related materials ....

33 C.F.R. § 323.2(f) (emphasis supplied) (Corps regulation); 40 C.F.R. 232.2 (EPA regulation). Based on the authority conferred by section 404, the Corps rationally applied these regulations, decided that the mine tailings were "placed" at a "specified disposal site," and concluded that Coeur Alaska needed a permit for the "discharge of fill material." This reasonable agency decision warrants judicial deference.

Moreover, the Corps did not decide alone whether a section 404 permit was appropriate in these circumstances. EPA was involved at every stage. According to the plaintiff's complaint:

> In May 2004, the *agencies decided* that the mine tailings should be deemed "fill material," and the Corps would regulate Coeur Alaska's discharge of the processed mine waste from the milling facility into Lower Slate Lake pursuant to section 404 of the Clean Water Act. EPA would regulate the discharges from Lower Slate Lake into waters below the lake pursuant to section 402 of the Act.

(Compl. ¶ 39. (emphasis supplied)). As the Federal Respondents' merits brief reports, EPA was one of the "cooperating agencies" that issued a final supplemental environmental impact statement addressing different sets of project alternatives, it identified "Alternative A as the environmentally preferable alternative," and it provided "comments" on a "detailed analysis of the alternatives ...." Br. for the Fed. Resp'ts Supporting Pet'rs, at 8-9 (S. Ct. filed Sept, 17, 2008).

Despite EPA's involvement in reviewing Coeur Alaska's discharge, EPA never exercised its prerogative to prohibit that activity. Section 404(c) provides that EPA is:

> authorized to deny or restrict the use of any defined area for specification ... as a disposal site, whenever [it] determines ... that the discharge of [fill] material into such area will

> have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ..., wildlife, or recreational areas. Before making such determination, [EPA] shall consult with [the Army].

33 U.S.C. § 1344(c). Under this section, "the EPA can veto the Corps' permit." *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003). Thus, in the context of considering Coeur Alaska's project, EPA had authority to veto the Corps's permit, decide that a section 402 permit was better suited to cover the discharge into Lower Slate Lake, and make applicable its section 306 performance standard regulating wastewater from froth floatation processes through the section 402 National Pollutant Discharge Elimination System (NPDES) program. Just because EPA never pursued this veto path or required a 402 permit does not render the Corps's issuance of the 404 permit unreasonable.

Thus, based on the definitions of "fill material" and "discharge of fill material" – which address the specific activity at hand and which the Corps has the expertise to implement – and after coordinating with EPA, the Corps appropriately concluded that Coeur Alaska's discharge required section 404 authorization. The Corps's permit decision was "rational and consistent with the statute." *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987).

II. A SINGLE DISCHARGE CANNOT BE REQUIRED TO OBTAIN BOTH A SECTION 404 AND A SECTION 402 PERMIT.

The Court's next questions from the May 4, 2009, order are:

> If a discharge comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material, may the discharger obtain permits under both Section 402 and Section 404 of the Clean Water Act? Must the discharger do so?

The quick answer to these questions is: No, the agencies cannot request or require a discharger to obtain *both* a section 402 *and* a section 404 permit for a *single* discharge.

NAHB respectfully submits that the agencies must determine whether a given discharge is "dredged or fill material" or "any" other pollutant. See NAHB Initial AC Br. at 3-14 (fill covered by section 404 is "placed" at "specified disposal sites"; sediment that settles to the bottom of or remains suspended in a waterbody is "any" other pollutant covered by section 402). The agencies are best suited to decide whether a discharge of solid material in any specific instance is either "fill material" or "any" pollutant. If they determine the discharge is dredged or fill material, then *only* section 404 applies. If, on the other hand, they determine that the discharge is some other pollutant, then *only* section 402 applies.

A. Section 402 Permits Cover "Other" Pollutants – That is, All Pollutants Except Fill Material.

Agencies and the courts must give effect to clearly expressed congressional intent. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The CWA is clear that a person *cannot* obtain both a section 402 and a section 404 permit for a single discharge.

Section 301(a) makes it unlawful to discharge any pollutants unless done in compliance with numerous sections of the Act, including sections 402 and 404. 33 U.S.C. § 1311(a). Section 402 begins: "*Except as provided in section[] ... [404]* of this title, the Administrator may ... issue a permit for the discharge of any pollutant, or combination of pollutants ...." *Id.* at § 1342(a)(1) (emphasis supplied). Section 402, therefore, is the backstop. EPA may issue a section 402 permit for a discharge, except if section 404 applies. In other words, the Administrator has no authority to issue a section 402 permit if section 404 is otherwise applicable. The statute is unequivocal in this regard. NAHB Initial AC Br. at 3-6. EPA's regulations interpret the statute in like manner. They provide:

> The following discharges do not require NPDES permits:
>
> . . . .
>
> (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of [the] CWA.

40 C.F.R. § 122.3(b); see also *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (developing the same paradigm in reliance on a joint EPA, Corps *amicus* brief).

Thus, the CWA and implementing regulations are clear: if a person discharges dredged or fill material, then that person must *only* procure a section 404 permit. In the case at hand, once the Corps concluded that Coeur Alaska's discharge was fill material, and EPA did not veto the Corps permit, then neither agency had any authority to require a section 402 permit for the discharge.[3]

B. Land Developers Obtain Separate CWA Permits for Separate Discharges at the Same Construction Site.

The residential land development process provides an example where the agencies have decided to require *separate* CWA permits for *separate* discharges at a *single* site – based on the nature of the pollutants being discharged.

To create homes, roads and infrastructure, NAHB's members must alter raw land. It is quite common for a parcel to contain small hydrologic features, such as ditches, ponds or wetlands, that must be filled to make the project viable. For example, previously farmed property will often contain ponds and ditches that were used for irrigation. Because of the Corps's and EPA's

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[3] Of course, the Respondents never challenged EPA for failing to issue a section 404(c) veto in this case. They sued only the Corps and the Forest Service.

expansive definition of the term "the waters of the United States," the agencies often proclaim that these features are within CWA jurisdiction. See *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality). Thus, the Corps frequently requires the developer to obtain a section 404 permit before filling or dredging these features.

The land development process also implicates EPA's NPDES section 402 stormwater program. When rainwater falls onto disturbed land, the storm runoff may transport sediment offsite and into "the waters of the United States." Therefore, EPA requires that any construction site in the nation larger than one acre must obtain section 402 permit coverage before development commences. See 40 C.F.R. § 122.26(a)(1), (9) (providing that stormwater permits are required for both industrial construction sites and small construction sites.) To comply with EPA's NPDES permit for construction activities, developers utilize best management practices such as sediment basins and silt fences. In all but four states[4] and the District of Columbia, section 402 stormwater permits are obtained from the delegated state.

Thus, it is not uncommon for one project to obtain both a section 404 and a section 402 permit. However, it is important to recognize that these permits are obtained for *separate* discharges – one for the fill activity, and one for the stormwater runoff. For a construction project, the government has *never*

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[4] Alaska, Massachusetts, New Hampshire, and New Mexico.

required two permits for a single discharge, or issued a single permit that covers an entire project.

Frankly, NAHB fears a ruling in this case that would lead to a "creative" interpretation that stormwater containing sediment – which EPA has always treated as "any" pollutant – is now also "fill material," because some sediment will eventually settle out and thereby raise the bottom of the receiving water.[5] To date, the agencies have determined that this type of stormwater discharge is not fill material, and thus does not require a section 404 permit. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002).

The CWA's permit programs are bureaucratic and expensive enough as it is.[6] The Court should direct the agencies to decide which permit program applies to a given discharge. However, it would contravene the CWA's structure and years of agency practice to now burden a landowner to comply with multiple

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[5] See NAHB Initial AC Br. at 12, n. 9 (providing references that sediment can settle to the bottom of receiving waters).

[6] "The average applicant for an individual [404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes .... 'Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.'" *Rapanos*, 126 S.Ct. at 2214 (plurality) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76, 81 (2002)).

permits for a single discharge. Surely, the CWA's purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. § 1251(a)), can be achieved if the agencies just do their job and decide which permit program best applies to a pollutant discharge. See NAHB Initial AC Br. at 17-34 (discussing myriad standards, procedures and mechanisms inherent in the section 404 permitting process to protect aquatic resources).

Accordingly, NAHB respectfully suggests that there should be no requirement (or "voluntary" suggestion) that a discharger must (or may) obtain two different permits, from two different issuing agencies, for the *same* discharge.

CONCLUSION

For the foregoing reasons, and for the reasons provided in NAHB's Initial AC Brief, the judgment below should be reversed.

May 15, 2009

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